Cemerlang Land Sdn Bhd v Ali bin Saat & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-412–10 OF 2016, W-01(A)-415–10 OF 2016 AND W-01(A)-417–10 OF 2016
TENGKU MAIMUN, VERNON ONG AND HASNAH HASHIM JJCA
1 AUGUST 2017

Administrative Law — Exercise of judicial functions — Jurisdiction — Whether House-Buyers' Claims Tribunal acted in excess of jurisdiction in awarding damages for late delivery of vacant possession on claims filed more than 12 months after buyers terminated their sale and purchase agreements ('SPAs') with housing developer — Whether tribunal's action exceeded functions, powers and jurisdiction conferred upon it by s 16N(2)(c) of the Housing Development (Control and Licensing) Act 1966 — Whether tribunal's awards irrational and unreasonable and had to be quashed — Whether tribunal failed to appreciate that the SPAs which were subject-matter of the buyers' complaints and with regard to which tribunal called upon to adjudicate had been mutually terminated and treated as null and void by the parties in consideration for their entering into fresh agreements

The common appellant in the three appeals herein was a housing developer which had signed sale and purchase agreements ('the first SPAs') with the house-buyer respondents for their purchase of apartments in a project which became abandoned and was never completed. Steps were taken by the authorities to revive the project and the appellant was appointed as the developer to carry it out. The appellant offered the original buyers new premises in the revived project at the purchase price they had previously agreed upon. Most of the original buyers, including the respondents, accepted the offer, signed a deed to revoke their first SPAs with the appellant and entered into new SPAs which promised to complete the project within three months. The revived project was completed and vacant possession of the units was handed over to all the buyers, including the respondents, within the time stipulated under the new SPAs. Sometime thereafter, the house-buyer respondents filed a claim against the appellant with the House-buyers' Claims Tribunal ('the tribunal') for damages for late delivery of the units they had agreed to buy under their first SPAs with the appellant. The tribunal awarded the damages sought for, ruling, inter alia, that the appellant was still bound by the terms and conditions of the first SPAs because their purported revocation was null and void as the agreements could only be terminated in accordance with s 8A of the Housing Development (Control and Licensing) Act 1966 ('the Act') and with the approval of the Jabatan Perumahan Negara under reg 11(3)

of the Housing Development (Control and Licensing) Regulations 1989, neither of which conditions had been satisfied. The tribunal also ruled that the respondents' claims for compensation for late delivery were not time-barred. The appellant applied to the High Court by way of judicial review for an order of certiorari to quash the tribunal's award. The High Court dismissed the application holding that the tribunal had not committed any serious error of law. The court held, inter alia, that an order to quash the tribunal's award could not be granted as that would relieve the appellant from having to bear the consequences of breaching its contract with the house-buyers under the first SPAs. The instant appeals were against a single decision of the High Court which affected all the house-buyer respondents herein. Since the facts in all the three appeals were identical, the Court of Appeal, for the purposes of this judgment, referred only to the facts in Appeal No W-01(A)-412–10 of 2016.

Held, allowing the three appeals herein and setting aside the decision of the High Court:

(1) The decision of the tribunal had to be set aside on the ground that it was irrational and unreasonable. The tribunal had acted in excess of its jurisdiction as the complaint to it was made after the second SPA and the deed of revocation were executed. In the light of the facts and the factual matrix of the circumstances, the decision of the President of the tribunal, when looked at objectively, was devoid of any plausible justification that no reasonable person or body of persons would have come to (see para 38).

(2) The High Court in the instant case had ignored the issue of the jurisdiction of the tribunal as spelt out under the Act. The tribunal could only consider a complaint if it was made within the time-frame stipulated. Section 16N(2) of the Act required the house-buyer respondent to have filed his complaint not later than 12 months from the date of termination of the first SPA dated 25 June 2002. The first respondent's' right of action for damages for breach of contract, following the general rule, accrued on the date of the breach, which was on 24 June 2005, when the appellant failed to deliver vacant possession as promised under the first SPA, the respondent, however, did not file any complaint to the tribunal within the time-frame stipulated under the Act. The complaint for late delivery under the first SPA was only filed after the execution of the second SPA and the handing over of the property to him (see paras 22–25 & 37).

(3) By the deed of revocation, the first respondent agreed to revoke and rescind the first SPA and to treat it as null and void. It was also agreed that the deposit the respondent had paid to the appellant would be refunded. The President of the tribunal was fully aware and conscious of the fact that the deed of revocation had revoked the first SPA — which was the

basis of the complaint to the tribunal whose jurisdiction was to hear and determine a home-buyer's claim arising out of a sale and purchase agreement that had been entered into by the parties. The President was also aware that the unit as described under the second SPA had been handed over to the first respondent within the time-frame stipulated. The first respondent had benefitted from the transaction as he was not only given vacant possession of the unit which he bought under the second SPA for the same purchase price but the deposit paid under the first SPA was also refunded to him (see paras 26, 28 & 37).

(4) The High Court committed a grave error when it, inter alia, brushed aside the facts and the law applicable and decided not to consider the submissions of the applicant as to whether the tribunal had committed an error. In exercising its judicial review powers, the High Court should have examined the tribunal's decision not only in relation to the process, but also for substance, in order to ascertain if the decision was tainted with illegality, irrationality or procedural impropriety (see paras 35–36).

[Bahasa Malaysia summary

Perayu dalam ketiga-tiga rayuan di sini adalah pemaju perumahan yang telah menandatangani perjanjian jual beli ('PJB pertama') dengan responden-responden pembeli rumah bagi pembelian pangsapuri mereka dalam projek yang telah ditinggalkan dan tidak pernah siap. Langkah-langkah telah diambil oleh pihak berkuasa untuk membangun semula projek tersebut dan perayu dilantik sebagai pemaju untuk menjalankannya. Perayu menawarkan pembeli-pembeli asal rumah baru di dalam projek yang dibangunkan semula tersebut pada harga belian yang mereka telah bersetuju sebelum ini. Kesemua pembeli-pembeli asal, termasuk responden-responden menerima tawaran tersebut, menandatangani surat ikatan untuk membatalkan PJB pertama mereka dengan perayu dan memasuki PJB baru yang menjanjikan untuk menyiapkan projek dalam masa tiga bulan. Projek yang dibangunkan semula tersebut siap dan milikan kosong unit-unit telah diserahkan kepada kesemua pembeli-pembeli, termasuk responden-responden, dalam masa yang ditetapkan di bawah PJB baru tersebut. Selepas itu, responden-responden pembeli rumah memfailkan tuntutan terhadap perayu dengan Tribunal Tuntutan Pembeli Rumah ('tribunal') bagi ganti rugi untuk penyerahan lewat unit-unit yang mereka bersetuju untuk membeli di bawah PJB pertama mereka dengan perayu. Tribunal mengawardkan ganti rugi yang dipohon, memutuskan, antara lain, bahawa perayu masih terikat oleh terma-terma dan syarat-syarat PJB pertama kerana pembatalan yang dimaksudkan tersebut adalah batal dan tak sah memandangkan perjanjian-perjanjian hanya boleh ditamatkan mengikut s 8A Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') dan dengan kelulusan Jabatan Perumahan Negara di bawah peraturan 11(3) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989, di

mana kedua-dua syarat tidak dipenuhi. Tribunal juga memutuskan bahawa tuntutan-tuntutan responden-responden bagi pampasan untuk penyerahan lewat tidak dihalang masa. Perayu memohon kepada Mahkamah Tinggi melalui semakan kehakiman bagi perintah certiorari untuk membatalkan award tribunal. Mahkamah Tinggi menolak permohon dengan memutuskan bahawa tribunal tidak melakukan apa-apa kesalahan serius undang-undang. Mahkamah memutuskan, antara lain, bahawa perintah untuk membatalkan award tribunal tidak boleh diberikan kerana ia boleh melepaskan perayu daripada menanggung akibat pelanggaran kontraknya dengan pembeli-pembeli rumah di bawah PJB pertama. Rayuan-rayuan ini adalah terhadap keputusan tunggal Mahkamah Tinggi yang menjejaskan responden-responden pembeli rumah di sini. Memandangkan fakta di dalam ketiga-tiga rayuan adalah sama, Mahkamah Rayuan, bagi tujuan penghakiman ini, merujuk hanya kepada fakta di dalam Rayuan No W-01(A)-412–10 Tahun 2016.

Diputuskan, membenarkan ketiga-tiga rayuan di sini dan mengetepikan keputusan Mahkamah Tinggi:

(1) Keputusan tribunal perlu diketepikan atas alasan bahawa ia tidak rasional dan tidak munasabah. Tribunal telah bertindak melebihi bidang kuasanya kerana aduan kepadanya dibuat selepas PJB kedua dan surat ikatan pembatalan dilaksanakan. Berdasarkan fakta dan matriks fakta keadaan, keputusan Presiden tribunal, apabila dilihat secara objektif, tidak mempunyai apa-apa justifikasi yang munasabah bahawa tiada orang yang munasabah akan mencapai kepadanya (lihat perenggan 38).

(2) Dalam kes ini Mahkamah Tinggi telah tidak mengendahkan isu bidang kuasa tribunal seperti yang dinyatakan di bawah Akta. Tribunal hanya boleh mempertimbangkan aduan jika ia dibuat dalam rangka masa yang ditetapkan. Seksyen 16N(2) Akta memerlukan respon pembeli rumah untuk memfailkan aduannya tidak lebih daripada 12 bulan dari tarikh penamatan PJB pertama bertarikh 25 Jun 2002. Hak tindakan responden pertama bagi ganti rugi untuk pelanggaran kontrak, berikutan peraturan am, terakru pada tarikh pelanggaran, yang mana adalah pada 24 Jun 2005, apabila perayu gagal untuk menyerahkan milikan kosong seperti yang dijanjikan di bawah PJB pertama, responden, walau bagaimanapun, tidak memfailkan apa-apa aduan kepada tribunal dalam rangka masa yang ditetapkan di dalam Akta. Aduan untuk penghantaran lewat di bawah PJB pertama hanya difailkan selepas pelaksanaan PJB kedua dan penyerahan hartatanah kepadanya (lihat perenggan 22–25 & 37).

(3) Melalui surat ikatan pembatalan, responden pertama bersetuju untuk membatalkan PJB pertama dan untuk menggangapnya batal dan tak sah. Ia juga dipersetujui bahawa deposit yang dibayar oleh responden kepada

perayu akan dikembalikan semula. Presiden tribunal menyedari sepenuhnya mengenai fakta bahawa surat ikatan pembatalan telah membatalkan PJB pertama tersebut — yang mana adalah asas aduan kepada tribunal yang bidang kuasanya adalah untuk mendengar dan menentukan tuntutan pembeli rumah yang berbangkit daripada perjanjian jual beli yang telah dimasuki oleh pihak-pihak tersebut. Presiden juga sedar bahawa unit seperti yang dinyatakan di bawah PJB kedua telah diserahkan kepada responden pertama dalam masa rangka masa yang ditetapkan. Responden pertama telah bermanfaat daripada transaksi tersebut kerana dia bukan sahaja diberikan milikan kosong unit yang dibelinya di bawah PJB kedua bagi harga belian yang sama tetapi deposit yang dibayar di bawah PJB pertama juga dipulangkan kepadanya (lihat perenggan 26, 28 & 37).

(4) Mahkamah Tinggi melakukan kesalahan yang serius apabila ia, antara lain, mengenepikan fakta dan undang-undang yang boleh digunapakai dan memutuskan untuk tidak mempertimbangkan penghujahan pemohon-pemohon sama ada tribunal telah melakukan kesalahan. Dalam menjalankan kuasa semakan kehakiman, Mahkamah Tinggi patut memeriksa keputusan tribunal bukan hanya berkaitan kepada proses, tetapi juga untuk isi kandungan, untuk memastikan jika keputusan tersebut dicela dengan tak sah, tidak rasional atau prosedur tidak betul (lihat perenggan 35–36).]

Notes

For cases on jurisdiction, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 244–251.

Cases referred to

Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor [1992] 1 MLJ 166; [1991] 3 CLJ 2834; [1991] 2 CLJ Rep 294, HC (folld)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17; [1997] 2 CLJ 248, CA (refd)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

R v Inner South London Coroner, ex parte Douglas-Williams [1999] 1 All ER 344, CA (distd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Shaw and another v Applegate [1977] 1 WLR 970, CA (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal

[1995] 2 MLJ 753; [1995] 3 CLJ 344, FC (folld)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 ss 8A, 16N(2)
Housing Development (Control and Licensing) Regulations 1989 regs 11, 11(3), Schedule H

Appeal from: Application For Judicial Review Nos 25–66–04 of 2015, 25–66–04 of 2015 and R2–25–67–04 of 2015 (High Court, Kuala Lumpur)

Rajashnee Suppiah (Mei Fun & Rajashree) for the appellant.
Mohd Fairuz bin Abdullah (Mohd Najid & Partners) for the respondent.

Hasnah Hashim JCA:

INTRODUCTION

[1] There were three appeals before us arising from three applications for judicial review in the High Court emanating from one judgment of the learned judicial commissioner. They involved different respondents but the same applicant (appellant) and were all heard together. The three appeals were against the decision of the learned judicial commissioner dismissing the appellant's application for judicial review. The appellant had applied for an order of certiorari to quash the decision of the President of the tribunal Tuntutan Pembeli Rumah ('the tribunal') made on 26 January 2015 ('the award'). The tribunal had on the said date awarded the respondents damages for late delivery of vacant possession by the appellant. The appellant, dissatisfied with the decision of the learned judicial commissioner appealed to this court.

[2] We heard the appeal on 27 March 2017. After due deliberation and having carefully considered the submissions of both parties we found that there are merits in the appeals and allowed all the appeals with costs. We propose to give reasons for our decisions with respect to all the appeals in one common judgment. Since the facts are common for all the three appeals, for purposes of this judgment, we will only be referring to the facts in Appeal No W-01(A)-412–10 of 2016, which parties had agreed to refer in their submissions.

MATERIAL FACTS

[3] The background facts are important to understand the context in which these appeals were brought. The appellant, is a company incorporated in Malaysia and is a housing developer previously known as Genting Unggul Sdn Bhd. The respondent entered into a sale and purchase agreement dated 25 June

2002 ('the first agreement') with the appellant to purchase one apartment unit described as No AC-03–02 at Amber Court, Desa Larkin, Johor ('Amber Court project'). The purchase price of the said unit was RM25,000. Clause 22 of the first agreement stipulates that the handing over of vacant possession of the unit shall be within thirty six months from the date of the aforesaid agreement.

[4] The Amber Court project consists of five blocks of 700 units of low cost flats ie Blocks A–E. Under the first agreement the respondent's unit was located on the third floor Block C. Unfortunately, the Amber Court project could not be completed within the period stipulated in the said agreement. On 31 December 2005 the Jabatan Perumahan Negara declared and classified the Amber Court project as an abandoned project.

[5] However, steps were undertaken by the authorities to revive the abandoned project. Subsequently a new development order was issued to revive the project and to build '... 179 Unit Rumah Teres 2 1/2 Tingkat di atas Lot 20203, Jalan Merak dan 3 Blok Rumah Pangsa 5 Tingkat (248 Unit Rumah Kos Rendah 650 kaki persegi di atas Lot PTB 20184, Jalan Rajawali, Mukim Larkin, Johor'. In 2014 the Jabatan Perumahan Negara after having classified the housing project as 'Projek Perumahan Bermasaalah di Negeri Johor' took steps to revive the housing project under the PR1MA Scheme. The appellant was appointed as the developer of the said project by the relevant authorities.

[6] The original purchasers of the abandoned project (including the respondent) were offered by the appellant to participate in the said revived project. Sometime in 2010 the respondent was offered by the appellant to purchase one unit of the low cost flat known as Project Larkin Court 1 ie Unit A-2–1 Blok A Tingkat 2 Rumah Pangsa No 1. By a letter of acceptance the respondent accepted the offer and agreed to revoke the first agreement.

[7] A deed of revocation dated 9 July 2013 was executed between the parties whereby it was mutually agreed to revoke and rescind the first agreement and to treat the said agreement as null and void:

> 1. In consideration of the premises herein the parties hereto mutually agree to revoke and rescind the sale and Purchase Agreement as null and void.

[8] A new sale and purchase agreement dated 9 July 2013 was drawn up and executed between the appellant and the respondent ('the second agreement'). The purchase price of the new unit remained at RM25,000 and the completion date as stipulated in the said agreement is within three months from the date of the said second agreement.

[9] The said revived project was completed and vacant possession of the unit was duly handed over to all the purchasers including the respondent within the time stipulated in the aforesaid second agreement.

[10] Sometime in 2014 the respondent filed a claim against the appellant with the tribunal for late delivery of the unit he purchased under the first agreement. The tribunal awarded to the respondent compensation for late delivery of vacant possession. Dissatisfied with the decision of the tribunal the appellant filed the judicial review in the High Court.

The tribunal

[11] The decision of the President can be found at pp 295–335 of the appeal records. He concluded that the second agreement together with the deed of revocation were executed without the approval of the Jabatan Perumahan Negara and that the second agreement executed by the parties was not in accordance to the agreement as prescribed in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR'). Regulation 11 of the HDR provides as follows:

> Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

[12] The President of the tribunal opined that the first agreement can only be terminated in accordance to s 8A of the Housing Development (Control and Licensing) Act 1966 ('the Act') and concluded that the revocation of the first agreement as well as the execution of the second agreement were null and void as they were not in accordance with the requirement of the law. The appellant was therefore still bound by the terms and conditions of the first agreement. Furthermore, the appellant failed to obtain the approval of the Jabatan Perumahan Negara as required under reg 11(3) of the HDR. He explained in his written findings as follows:

> 52. Selaras dengan dapatan Tribunal keatas Isu-Isu (i), (ii) dan (iii) diatas, Tribunal mendapati bahawa penghujahan-penghujahan yang dikemukakan oleh Responden seperti dinyatakan dalam perenggan 26(i), (ii) dan (vi) di atas adalah tidak berasas dan adalah ditolak atas alasan bahawa:
>
> (i) Responden tidak boleh menamatkan sesuatu perjanjian jual beli rumah melainkan selaras dengan peruntukan 8A Akta 118 dan Peraturan dibawahnya;

(ii) Pembatalan Perjanjian Pertama dan pemeteraian Surat Indemniti, Surat Kuasa dan Perjanjian Kedua tanpa kelulusan atau kebenaran khas oleh JPN di bawah Peraturan 11(3) adalah tidak sah kerana ia merupakan suatu perbuatan berkontrak keluar daripada peruntukan khusus Akta 118 dan Peraturan dibawahnya. *Responden adalah masih terikat dengan syarat-syarat Perjanjian Pertama untuk menyerahkan milikan kosong rumah* dan kemudahan kemasyarakatan yang dibeli oleh Pemohon di bawah Perjanjian Pertama dalam tempoh 36 bulan dari tarikh Perjanjian Pertama ditandatangani;

(iii) Sekiranya Responden, sebagai kontraktor penyelamat, hendak mengecualikan dirinya daripada membayar gantirugi yang ditentukan atas kelewatan menyerahkan milikan kosong rumah dan kemudahan kemasyarakatan di bawah projek yang terbengkalai kepada Pemohon dan pembeli-pembeli lain, Responden hendaklah memohon dan mendapatkan kebenaran khas sedemikian daripada JPN di bawah Peraturan 11(3) Peraturan Pembangunan Perumahan (Kawalan dan Pelesenan) 1989 ...

[13] The President concluded that the respondent's claim for compensation for late delivery was not time barred. The appellant failed to hand over vacant possession to the respondent under the first agreement and there was therefore a delay of 3111 days calculated from 25 June 2005–31 December 2013.

THE HIGH COURT

[14] The learned judicial commissioner dismissed the judicial review application as he found that the President of the tribunal did not commit any serious errors of law in arriving at his award. The respondent had no other remedy as a result of the breach of the first agreement by the appellant. He was of the considered view that if an order for certiorari was granted the appellant would not be responsible for the breach of the agreement for the failure of not handing over vacant possession as stipulated in the first agreement. In his grounds of judgment the learned judicial commissioner said this when refusing judicial review:

[20] Pada pendapat mahkamah ini:

(a) mengikut autoriti kes *Law Pang Ching & Ors v Tawau Municipal Council*, oleh kerana pihak pemohon sebagai pemaju projek perumahan telah melanggar terma kontrak-kontrak yang diikat pada tahun 2002, mahkamah ini tidak akan melaksanakan budi bicaranya bagi membantu pemohon, sekalipun jika terdapat kekhilafan undang-undang pada keputusan Presiden yang terpelajar; dan

(b) mengaplikasikan formula yang digubal oleh Lord Woolf MR dalam kes *ex parte Douglas-Williams*, suatu perintah certiorari tidak menjadi wajar atau perlu demi kepentingan keadilan, kerana dalam kes ini, responden-responden tiada remedi lain terhadap perlanggaran kontrak

oleh pihak pemohon berkenaan dengan persetujuan tahun 2002, seperti yang pihak pemohon sendiri akui. Jika perintah certiorari diberikan kepada pemohon, ini akan bermakna bahawa pemohon tidak perlu menanggung akibat perlanggaran kontraknya sendiri.

THE APPEAL

[15] Before us, learned counsel for the appellant submitted that the award made by the President of the tribunal was wrong and could not be sustained in law and that the learned judicial commissioner had erred in upholding the said Award. It was submitted that in the light of the facts and the circumstances of the case put forth before the tribunal, the decision arrived at was tainted with illegality and irrationality. The President had taken into account irrelevant considerations, failed to take into account relevant considerations and material facts and had acted against the weight and totality of the evidence.

[16] The Federal Court case of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and the case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 held that the decision of the inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality and the courts are permitted to scrutinise such decisions not only for process but also for substance.

[17] It is trite law that courts should not reverse an award of a tribunal unless there is proven a clear jurisdictional error. A jurisdictional error can arise when a tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued the law on an issue on which its decision is founded.

(Re: *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748).

[18] As Gopal Sri Ram JCA (as he then was) said in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 at p 32; [1997] 2 CLJ 248 at p 269:

> ... where the exercise of a decision is challenged on grounds of vires that is illegality, or unreasonableness, the court is not confined merely to the decision-making process, but may examine the merits of the decision itself.

[19] We are further guided by what was stated in the Federal Court case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 757; [1995] 3 CLJ 344 at p 348:

A In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, are so devoid of any plausible justification that no reasonable person or B body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v Greater London Council and Anor* [1983] 1 AC 768 at p 821).

C **[20]** It is trite law that certiorari will lie to quash a decision made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority. For a decision to be quashed on judicial review, there must first be a decision by a decision maker, and the said decision affected the aggrieved party D by either altering the rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[21] The court must review the decision in order to determine the basis of a E material mistake of fact on the part of the person who made the decision or where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper process, or where the functionary misconceived the nature of the discretion conferred upon him and took into consideration irrelevant F issues or ignored relevant ones.

[22] In the instant appeal the functions, powers and jurisdiction of the tribunal are spelt out in the Act. Section 16N(2) of the Act provides for the limitation to the jurisdiction of the tribunal as follows:

G (2) The jurisdiction of the tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from —

H (a) the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later;

(b) the expiry date of the defects liability period as set out in the sale and purchase agreement; or

I (c) the date of termination of the sale and purchase agreement by either party and such termination occurred before the date of issuance of the certificate of completion and compliance for the

(d) housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later.

[23] Section 16N(2) of the Act requires the respondent as a house buyer to file the complaint 12 months from the date of termination of the sale and purchase agreement which would be the first agreement. The essential facts to be considered is that under the first agreement dated 25 June 2002 it was clearly provided by cl 22 of the said agreement, as follows:

> 22(1) Vacant possession of the said Parcel to which the water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement; and
>
> (2) If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[24] It was common ground that the unit was not completed and available for delivery as provided under agreement. The purchaser's right of action for damages for breach of contract, following the general rule, accrued on the date of the breach, which in this case was the day after the time limited under cl 22, that is to say, on 24 June 2005 when the appellant failed to deliver vacant possession as stipulated under the first agreement.

[25] The respondent, however did not file any complaint to the tribunal within the time as provided under the Act. The complaint for late delivery under the first agreement was only filed after the execution of the second agreement and the handing over of the property to him.

[26] By the deed of revocation the respondent had agreed to revoke and rescind the first agreement and to treat the said agreement as null and void subject to and upon the terms and conditions as agreed. It was also agreed that the progressive amount (ie the deposit of RM2,500) paid by the respondent to the developer shall be refunded.

[27] Counsel for the appellant argued that in the present appeal the cause of action arose in the year 2005 which was the earliest instance when the respondent has a complete cause of action where all the material facts to be proved has happened. It is further submitted that the cause of action under the first agreement due to the failure to deliver vacant possession arose in year 2005. However, the parties had mutually revoked the first agreement and executed the second agreement whereby the unit purchased by the respondent was duly handed over.

[28] The President of the tribunal was also fully aware and conscious of the fact that the respondent had by the deed of revocation revoked the first

agreement which was the basis of his complaint to the tribunal the jurisdiction of the tribunal that is, to hear and determine a homebuyer's claim arising out of a sale and purchase agreement entered into by the parties. He was also aware that the unit as described under the second agreement was handed over to the respondent within the time stipulated.

[29] This court is guided by the principles enunciated in the case of *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166; [1991] 3 CLJ 2834; [1991] 2 CLJ Rep 294. The facts of the case are almost similar to the facts in the appeal before us. The plaintiffs in that case were purchasers of houses developed by the first defendant under sale and purchase agreements entered into between the plaintiffs and the first defendant. The first defendant, however was unable to complete the project and the second defendant took over and completed the project. The court held that the second defendant decided to take over the project and built the houses according to more expensive specifications. The plaintiffs had all gained and enjoyed the benefit of such specifications. The court held that the plaintiffs were not entitled to claim liquidated damages for late delivery of the houses against the second defendant. His Lordship Peh Swee Chin J referred to the principles in the case of *Shaw and another v Applegate* [1977] 1 WLR 970 in which Justice Buckley LJ held as follows:

> ... the real test, I think, must be whether upon the facts of the particular case, the situation has become such, that it would be dishonest or unconscionable for the plaintiffs or the person having the right sought to be enforced, to continue to seek to enforce it.

[30] Relying on this principle, His Lordship held as follows:

> The extraordinary situation described above was such that it would be unconscionable for the plaintiffs to insist on strictly enforcing the obligation providing for the payment of the said liquidated damages for late delivery of houses, and it was for this court to decide how an equity should be satisfied.

[31] We find that that the learned judicial commissioner had misdirected himself when he said in his written judgment:

> Jika sekalipun terdapat apa-apa kekhilafan dari segi undang-undang yang telah dilakukan oleh Presiden Tribunal terpelajar, ianya tidak akan sama sekali menjejaskan keputusan untuk menolak permohonan certiorari yang dipinta. Oleh yang demikian, tidak perlu lagi mahkamah ini mempertimbangkan hujahan-hujahan peguam pemohon yang mendakwa bahawa Presiden Tribunal telah terkhilaf dari segi undang-undang.

[32] In his grounds of judgment the learned judicial commissioner said:

> (b) mengaplikasikan formula yang digubal oleh Lord Woolf MR dalam kes *ex parte*

Douglas-Williams, suatu perintah certiorari tidak menjadi wajar atau perlu demi kepentingan keadilan, kerana dalam kes ini, responden-responden tiada remedi lain terhadap perlanggaran kontrak oleh pihak pemohon berkenaan dengan persetujuan tahun 2002, seperti yang pihak pemohon sendiri akui. Jika perintah certiorari diberikan kepada pemohon, ini akan bermakna bahawa pemohon tidak perlu menanggung akibat pelanggaran kontraknya sendiri.

[33] With respect, we do not agree with the reasoning of the learned judicial commissioner that when it comes to exercising its discretion the test for the court to apply when deciding whether it should give relief is that it should be necessary or desirable to do so in the interest of justice. The facts of the case of *R v Inner South London Coroner, ex parte Douglas-Williams* [1999] 1 All ER 344 relied on by the learned judicial commissioner can be distinguished. In *ex parte Douglas-Williams* the deceased died in custody. The jury returned a verdict of accidental death and it was suggested that the coroner's direction as to unlawful killing had been confusing, and that he was wrong not to leave open the possibility of a verdict of neglect. Lord Woolf MR in his judgment explained as follows:

> The conclusion I have come to is that, so far as the evidence called before the jury is concerned, a coroner should adopt the Galbraith approach in deciding whether to leave a verdict. The strength of the evidence is not the only consideration and in relation to wider issues, the coroner has a broader discretion. If it appears there are circumstances which, in a particular situation, where in the judgment of the coroner, acting reasonably and fairly, it is not in the interest of justice that a particular verdict should be left to the jury, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the coroner's conclusion he cannot be criticised if he does not leave a particular verdict.

[34] The facts in the instant appeal are far from similar. The laws applicable, are also different. The relevant legislations in this appeal are the Housing Development (Control And Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989. The Act provides for the control and licensing of the business of housing development, the protection of the interest of purchasers and for matters connected therewith. It confers the tribunal, amongst others, the jurisdiction to hear claims for late delivery. There is also the issue of the second agreement entered into between the appellant and the respondent revoking the first agreement.

[35] In our view the learned judicial commissioner had committed a grave error when he applied the principle formulated by Lord Woolf MR in the case of *ex parte Douglas-Williams* and brushed aside the facts and the law applicable before him. He decided not to consider the submission of the applicant

whether there was an error on the part of the tribunal and not to determine as well as to identify the error, if at all committed by the tribunal.

[36] As a judge, in exercising judicial review powers, the judicial commissioner must examine the decision of the tribunal not only in relation to the process, but also for substance in order to ascertain if such decision was tainted with illegality, irrationality or procedural impropriety within the principles amongst others outlined in the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935, *R Rama Chandran v Industrial Court of Malaysia & Anor* and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*.

[37] It is an undisputed fact that the respondent had executed the deed of revocation revoking the first agreement and then executed the second agreement. The judicial commissioner had ignored the issue of jurisdiction of the tribunal. Under the Act the tribunal can only consider the complaint if it was made within the time stipulated and that the tribunal can only award compensation for late delivery. The respondent had benefitted from the transaction as he was not only given vacant possession of the unit which he bought under the second agreement with the same purchase price but the deposit paid under the first agreement was refunded to him.

[38] We agree with the submissions of the appellant's learned counsel that the decision of the President of the tribunal ought to be set aside on the grounds that the decision is irrational and unreasonable. The tribunal had also acted in excess of its jurisdiction as the complaint was made after the second agreement and the deed of revocation were executed. In the light of the facts and the factual matrix of the circumstances, we are satisfied that the decision of the President of the tribunal when looked at objectively, is devoid of any plausible justification that no reasonable person or body of persons could have come to. On this ground alone the appeal ought to be allowed.

[39] Thus, for the reasons given, we were of the unanimous view that the appeal must be allowed. The order of the High Court was set aside. We made no order as to cost. The deposit was refunded.

Order accordingly.

Reported by Ashok Kumar